No. 93-842 (2)

In The

FILED
DEC 28 1993
OFFICE OF THE CLERK

SUPREME COURT of the UNITED STATES

October Term, 1993

RICHARD K. EHRLICH, as Trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965 Trust,

Petitioner,

v.

CITY OF CULVER CITY, CITY COUNCIL OF THE CITY OF CULVER CITY, STEVEN GOURLEY, JOZELLE SMITH, JAMES BOULGARIDES, PAUL A. JACOBS,

Respondents.

On Petition for Writ of Certiorari to the Court Of Appeal, State of California

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether a developer fee, which was imposed to mitigate the impact of granting a property owner's request for a land use change, was a constitutionally permissible monetary exaction related to a legitimate public purpose?

Whether a development condition, which requires the placement of art at a development site, or at the developer's option the payment of a fee in lieu of the art, violates the Taking Clause of the Fifth Amendment, the Freedom of Speech Clause of First Amendment or the Equal Protection Clause of the Fourteenth Amendment?

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RICHARD K. EHRLICH, as Trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965 Trust,

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BRIEF IN OPPOSITION

Respondents, City of Culver City, City Council of the City of Culver City, Steven Gourley, Jozelle Smith, James Boulgarides, Paul A. Jacobs, (hereinafter the "City")

respectfully request this Court deny the Petition of Richard K. Ehrlich, as Trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965 Trust (hereinafter "Petitioner") for a writ of certiorari seeking review of the opinion of the California Court of Appeal, Second Appellate District, Division Five.

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.1[1], the City presents the following statement of the case to address petitioner's omissions and to supplement the statement of the case presented by petitioner.[2] Petitioner has omitted the statutory scheme the California Legislature has prescribed to meet this Court's requirements under Nollan v. California Coastal Comm'n., 483 U.S. 825 (1987). Petitioner never made any attempt to seek the City's permission to modify the Specific Plan which was applicable to the subject property. Finally, Petitioner failed to note the City was able to approve Petitioner's requested residential land-use approvals only because it

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[1] Respondents' Brief in Opposition is timely pursuant to Supreme Court Rule 15.2. Respondents received the petition on November 29, 1993.

[2] Petitioner goes to great lengths to persuade this Court with numerous inappropriate citations to the voided opinion of the Court of Appeal in this matter. Pursuant to California Rules of Court (CRC 976) and Miller & Lux, Inc. v. James, 180 Cal.38 49 (1919), when a court of appeal grants a request for rehearing of an opinion, that opinion is vacated and has no effect.

also approved an amendment to the City's General Plan.

A. California's Statutory Scheme to Implement the *Nollan* Nexus Requirement

In 1987, in response to the concerns expressed in this Court's decision in Nollan, supra, the California Legislature adopted statutory restrictions on development fees imposed by government agencies. This legislation (known as and referred to hereinafter as the "developer fee statute") was intended to protect landowners from being singled out to bear public burdens and to insure all local California governments complied with Nollan's requirements that land use regulations substantially further a legitimate state interest.[3] The developer fee statute allows local governments to impose development fees only where they have made certain findings and have complied with specific procedures. In the State proceedings, petitioner alleged the City violated the developer fee statute when it imposed the subject mitigation fee. The Court of Appeal found the City complied with the developer fee statute. App. 23 and 24. Because of the applicability of this statutory scheme, it is

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[3] The developer fee statute is codified at Sections 66000 et seq. of the California Government Code. The pertinent section, which establishes the nexus requirement, is set forth in Cal. Government Code Section 66001 (reprinted in its entirety in Court of Appeal Opinion at App. 21-23 [fn. 2] of petitioner's Petition for Writ of Certiorari). Hereinafter, references to the petition shall be noted as Pet. at __; references to any appendix of the petition shall be noted as App. __.

important to an understanding of this case that an explanation of the developer fee statute be included.

The developer fee statute forbids imposition of any development fee unless the local government has demonstrated a cause and effect relationship between the project subject to the fee and the problem to be addressed. The local agency must make specific findings that there is a reasonable relationship between: (1) the fee's use and the type of development project on which the fee is imposed [Cal. Government Code § 66001(a)(3)]; (2) the need for the public facility [financed by the fee] and the type of development project on which the fee is imposed [Cal. Government Code § 66001(a)(4)]; and (3) the amount of the fee and the cost . . . of the portion of the public facility attributable to the development on which the fee is imposed. [Cal. Government Code § 66001(b)]. The City's compliance with these requirements is not before the Court. The Court of Appeal determined the City met this statutory scheme:

> Here, the City found that the mitigation fee would be used to pay for replacement of community recreational facilities which had been provided by the land-use restrictions on the property, the opportunity for which recreational facilities would be lost by approval of the project. The City found that the recreational facilities which had been on the property included tennis courts, paddle tennis courts, swimming pool, running track, aerobics area, jacuzzi, and sauna. The City found that the value of the recreational facilities which had been on the property was $800,000, the value of the project was $10 million, and the replacement cost of just four tennis courts would be approximately $280,000.

> The $280,000 was earmarked specifically to replace community recreation facilities. These findings are adequate and reasonable (Footnote omitted).

App. 23 and 24.

In addition, to the above requirements, local governments in California must identify the specific purpose of the fee and the use to which the fee will be put. Cal. Government Code Section 66001(a)(1) and (2). To ensure that fees are not diverted to the local government general fund, the developer fee statute further requires that all fees and interest thereon be maintained in a separate fund or account. Cal. Government Code § 66001(c). If a development fee is not expended or committed within five years, the local government must make further findings each year thereafter to demonstrate a continuing reasonable relationship between the anticipated use of the fee and the purpose for which it was imposed. Cal. Government Code § 66001(d). If this finding cannot be made, the local government is required to refund the fee. Cal. Government Code § 66001(e).[4]

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[4] Petitioner challenged the City's compliance with other provisions of the Government Code requiring that fees and exactions "not exceed the estimated reasonable cost of providing the service or facility for which the fee or exaction is imposed" [Cal. Government Code § 66005(a)] and that any fee or exaction which does exceed the reasonable cost, must be treated as a special tax subject to the provisions of California's "Proposition 13" (Art. XIIIA, § 4 of the California Constitution) and California Government Code §§ 50075 and 50076. The Court of Appeal determined the City had also complied with these requirements. App. 16-20 and 24.

B. Lack of Ripeness.

An economic feasibility study prepared by the City found inconsistency of management and problems of upkeep were contributing factors to the financial problems of the facilities which existed on the site, pursuant to the Specific Plan. App. 7. This same study also showed a modified recreational facility could be a viable use for the property. App. 7, 8, 12 and 13. Even petitioner admits a community recreational facility could be economically operated on subject property. Pet. at 6. Notwithstanding this, petitioner never requested the City to grant a modification to the Specific Plan to permit redevelopment of the property for a new, reconfigured community recreational facility use.

On April 10, 1989, Petitioner's initial application for the residential development was denied on the grounds that the existing land use restrictions on the property were needed by the community. App. 4. The City's Human Services Director submitted a report which showed the property had a history of community recreational use and the loss of the opportunity for the continuance of such facilities, which would result from a land use change, would negatively impact the community. App. 8. The above evidence clearly supports the City's determination that the recreational facilities land use restrictions on the subject site would meet the community needs, the public interest and provide an economically viable project for the site.

Notwithstanding this, Petitioner never requested permission to redevelop the site to provide such facilities. In fact, from 1974 through 1988 the petitioner, on only two occasions, requested permission to develop the property other than as required by the Specific Plan. In 1981,

petitioner requested permission to construct an office building. This request was presented to the Planning Commission. The Planning Commission recommended denial, and the petitioner never pursued it through City Council hearings. Then, in September of 1988, petitioner applied for the residential use (30 deluxe townhomes) which upon reconsideration the City granted. Pet. at 4-7.

C. The City Was Not Required to Approve the Townhome Project.

One of the land use approvals requested by petitioner in September, 1988 was a General Plan amendment. App. 7. The General Plan land use designation for the subject property, prior to the City's actions to approve the townhome project, was commercial. In order to approve the condominium project, the City also had to approve a tentative and final tract map pursuant to the California Subdivision Map Act. App. 7; Cal. Government Code §§ 66410, et seq., specifically Section 66426. Pursuant to the Subdivision Map Act, the City could not approve the condominium project unless it could make a finding the condominium project was consistent with the City's General Plan. Cal. Government Code § 66474. In order to make such a finding, the City had to redesignate the petitioner's property from the General Plan land use designation of commercial to residential.

REASONS FOR DENYING THE WRIT.

THIS CASE PRESENTS NO ISSUES MERITING SUPREME COURT REVIEW

A. Mitigation Fee.

1. The Mitigation Fee Does Not Conflict With Any of This Court's Rulings Regarding Regulatory Takings

Petitioner relies on Supreme Court Rule 10.1(c) to support its request for a Writ of Certiorari. Petitioner contends the Court of Appeal opinion conflicts with this Court's decision in Nollan, supra. Pet. at i and 13. Petitioner's assertion is totally without merit.

The Court of Appeal opinion makes it clear the Nollan two-prong test was appropriately applied. App. 11. The Court of Appeal first reviewed whether the City could have denied the application for the 30 deluxe townhomes. After determining the City could, the Court of Appeal then reviewed the facts of the case to determine whether the mitigation fee, which was imposed as a condition of approving changes to the land use designations in order to permit the 30 deluxe townhomes, substantially furthered the goal which would have been reached by the denial.

Petitioner also attempts to overturn the Court of Appeal decision because of its reliance on Blue Jeans Equities West v. City and County of San Francisco, 3 Cal.App.4th 164 (1992), and Commercial Builders v. Sacramento, 941 F.2d 872 (9th Cir. 1991). This Court denied petitions for writs of certiorari in both cases. __ U.S. ___, 113 Sup.Ct. 191 (October 1992) and ___ U.S. ___, 112 Sup.Ct. 1997 (May 1992), respectively. Both Blue

Jeans Equities West and Commercial Builders held that developer fees should be reviewed under a different standard of review (the rational relation test) than are physical exactions, such as an easement (the substantially advance test). Even though case precedent would permit the use of the more relaxed rule in this case, the Court of Appeal applied both the "rational relation" test and the "substantially advanced/heightened scrutiny" test of Nollan. After doing so, the Court of Appeal found the mitigation fee met both tests. "There was a substantial nexus between the land-use restriction and the condition of approval." App. 14.

The first question to be addressed, pursuant to Nollan, is whether the City could have denied petitioner's request to build 30 deluxe townhomes. Petitioner tries to cloud this first inquiry by stating the City could not have forced petitioner to stay in the recreational facility business or replace its demolished facilities. The City agrees and has never said otherwise. The City could not force petitioner, or any other person, to operate any business on the subject site or anywhere else. The Court of Appeal opinion echoes this conclusion. Pet. at 15. However, such restriction does not negate the City's authority to plan its community for various uses, including recreational facilities, which the legislative body determines are necessary for the public health and welfare. This is a fundamental authority every City has under its police power. Village of Euclid v. Ambler Realty Company, 272 U.S. 365 (1926); Keystone Coal Association v. DeBenedictis, 480 U.S. 470 (1987). Based on the foregoing long recognized authority, the City can regulate the use of land within its jurisdiction in such a way as to provide the community with the opportunity to have housing in certain areas, commercial and industrial uses in other areas and

recreational facilities constructed and properly operated, managed and maintained on the subject site.

This is true even if, as in this case, the property owner no longer wanted to provide the use required by the City's land use approvals. This authority is no different from the City's power to require certain properties to be designated solely for rental housing for low- and moderate-income residents, television and movie studios, stadiums, or a regional shopping mall. A property owner's options would be (i) to leave the land fallow and exclude all others from it, (ii)to use the property as authorized or for a similar use subject to the approval of any necessary modification or (iii) to sell the property to another to be used as authorized or with modifications, but for the same use. Petitioner had the exact same options. App. 16.

Petitioner states that if the land use scheme described above is permitted to stand then cities will "over regulate" (Pet. at 24) or require payments for removal of parochial schools and grocery stores (Pet. at 21). This contention is no more than unfettered and unsupported hyperbole.

With regard to the theoretical parochial school issue, the Establishment Clause of the First Amendment would prohibit a city from regulating property in such a way as to require such a use to be placed on the property. Likewise, the Establishment Clause would prohibit a city from requiring the payment of a fee which would be spent to support such a use. Therefore, a city could not require payment of a fee which would be used to replace a removed school.

With regard to the grocery store example, any city would be hard pressed to show loss of one grocery store

could cause a significant impact on the community. When so many other similar establishments would likely be readily available, it would be virtually impossible to require some special mitigation. In addition, the City is unaware of any authority it could rely upon which would permit it to operate a commercial grocery store.

Unlike parochial schools and grocery stores, recreational facilities have been recognized to serve legitimate public interests and benefits, which can be served through development conditions. Associated Home Builders of the Greater East Bay, Inc. v. Walnut Creek, 4 Cal.3d 633 (1971) [cert. denied 404 U.S. 878 (October 19, 1971)]. Based on all the foregoing, the City would have been well within its municipal police power if it had denied the request to change the land use designation.

Fundamental to petitioner's argument that the City could not meet the first prong of the Nollan test is the incorrect assumption the City was obligated to approve the 30 deluxe townhome project. This assumption runs afoul of every city's long recognized police power and legislative discretion. The fact that a property owner chooses not to use property according to its land use designation does not mean a city must redesignate the property as that property owner desires. Penn. Central Transportation Co. v. New York City, 438 U.S. 104, 125-138 (1978). This is especially true if the existing land use designation, or some modification thereto which provides for a similar type of use, enables the property owner to have an economically viable use for the property.[5]

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[5] Petitioner should not be allowed to argue it could not continue to provide recreational facilities on the site because the Specific Plan was too restrictive. Pet. at 16 and

It is also important to note, even assuming arguendo the recreational facility use for the site was not economically viable, petitioner's interest in the subject property was obtained after the recreational community facility designation was placed on the property. App. 73. This fact is important because this Court has said even a regulation which deprives land of all economically beneficial use does not affect a compensable taking if "the prescribed use interests were not part of [the property owner's] title to being with." Lucas v. South Carolina Coastal Council, 505 U.S. ____, 112 Sup.Ct. 2886, 2899 (1992). In addition, as noted by the Court of Appeal (App. 13), petitioner purchased the subject property with the knowledge of the recreational use restrictions and with the intent to develop the property as a recreational facility. Pet. at 4 and 5. The relevance of petitioner's intentions regarding the property was recognized by this Court.

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17. The record is void of any evidence or inference that petitioner ever requested the City to modify the Specific Plan to provide a different configuration for community recreational facilities. Had the petitioner done that, been denied such a request, and then requested the City to put some other use on the property which was also denied, such facts could very well have left the petitioner with no economically viable use of the property. However, such a situation is not present in this case. Petitioner never pursued an application through the full legislative and administrative process for any use other than the deluxe townhome project. Therefore, petitioner's argument in this regard is not ripe for adjudication. Williamson County Regional Planning v. Hamilton Bank of Johnson City, 473 U.S.172 (1985); MacDonald Sommer & Frates v. Yolo County, 477 U.S. 340 (1986).

> Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." [Citation omitted.] "In engaging in these essentially ad hoc, factual inquires, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.

Penn Central Transportation Co., supra, 438 U.S. at 124.

Based on all the foregoing, the City and the Court of Appeal have established the first prong of Nollan has been met. The City could have denied petitioner's request for a land use change.

The facts just as clearly show the second prong of the Nollan test has also been met. The sole purpose of the mitigation fee is to provide the City with dollars which were specifically restricted for use by the City to provide an opportunity to have recreational facilities within its jurisdiction. The opportunity provided by the mitigation fee is similar to the opportunity the City would have had it if had denied the requested changes to the land use designation. If the recreational facility land use designation had remained, the City would have continued to have the opportunity of realizing construction and operation of much needed recreational facilities for the

community. The mitigation fee, in a small way,[6] continued to provide the community with such an opportunity.

2. The Mitigation Fee Did Not Violate Petitioner's Equal Protection Rights

Petitioner claims, only with the support of a footnote from Nollan, the mitigation fee violates the Equal Protection Clause. Pet. at 26. The Court of Appeal gave such an argument the short shrift it deserved. That court concluded the fee was reasonably related to the loss of the opportunity for recreational facilities on the subject site, and, therefore, no equal protection violation occurred. App. 20.

The question presented by the footnote quoted by petitioner is whether the burden being suffered is a public burden which should not be borne by one property owner. The burden is definitely a public burden, the loss of the opportunity for needed community recreational facilities. However, the burden is created by petitioner's request for a zone change.

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[6] The record contains evidence showing the cost of the improvements that had been provided on the site for many years were worth at least $800,000. The record also shows that to replace the tennis courts would cost somewhere between $275,000 to $300,000, to replace the paddle tennis courts would cost between $135,00 or $150,000, and to replace the pool would cost between $250,000 and $280,000. App. 3, 8, 9 and 16. Based on these facts and the additional evidence that the townhome project was valued at $10 million, the Court of Appeal correctly found that the $280,000 mitigation fee was not excessive or arbitrary. App. 16.

As previously shown, the City could have refused the zone change. In doing this, petitioner would not have suffered any unconstitutional taking and yet the community would have retained the opportunity for community recreational facilities. Instead of "exacting" this from the petitioner, the City found a compromise. It granted petitioner the requested zone change, which permitted a $10,000,000 townhome project to be built. In exchange, it protected the public welfare by conditioning the approval on the payment of the mitigation fee. This accommodation did not burden petitioner disproportionally when compared to the burdens caused by the requested zone change.

This exaction was certainly different from any other exaction on any other property owner. However, petitioner's request was likewise unique and many, if not most, of the benefits which resulted from granting the request accrued to petitioner alone and not to the public. Because the mitigation fee did not create an unfair burden on petitioner, the City did not violate the Equal Protection Clause

3. Various Other Cases Cited By Petitioner Are Inapplicable

Briefly discussed next are petitioner's references to other decisions from this Court. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) is a case which dealt with a physical taking of property. In Loretto, New York required landlords to permit cable television companies to lay wire on their buildings. The inapplicability of Loretto to this case is made clear by this Court's decision in Yee v. Escondido, 503 U.S. ___, 112 Sup.Ct. 522 (1992), which petitioner also cites to support its claims.

In Yee, this Court found California's mobile home residency law did not create a physical taking. "The government affects a physical taking only when it requires the land owner to submit to a physical occupation of his land. [Emphasis original.]" Yee, supra, 503 U.S. at __, 118 L.Ed. 2d at 165. "On their face, the state and local laws of issue here merely regulate petitioners' use of their land by regulating the relationship between landlord and tenant. [Emphasis original.]" Ibid. at __, 118 L.Ed.2d at 166. The recreational facility land use restriction in question here also only regulated how the land would be used. It did not require petitioner to use the land. It did not permit the City or anyone else to enter onto the land. Nor did it require petitioner to open and operate any business. What it did do was mandate how the petitioner could use its land, if and when the petitioner chose to develop it. Pursuant to Yee, supra, this was a legitimate exercise of the City's police power.

Petitioner cites to Ruckelshaus v. Monsanto Company, 467 U.S. 986 (1984) and Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980). In Ruckelshaus, this Court determined the Environmental Protection Agency could not transform private trade secrets into public property by requiring such trade secrets to be disclosed on reporting forms. In Webb's Fabulous Pharmacies, Inc., this Court determined money deposited in court in order for the depositor to avail itself of statutory protections for clearance from creditors also could not be transformed into public funds. Such attempts at transformation of private property into public property is not a factor in this case. At all times while the recreational use restrictions applied to the property, it remained private. At any time during that period, petitioner could have conveyed its property to another. In fact, while the recreational facility land use

restrictions applied to the site that is exactly what happened on two occasions. First, ownership was conveyed to Richard K. Ehrlich. Then, at some later date, two family trusts were given title. Therefore, one of the fundamental incidents of ownership, the right of alienation, was always retained by the owner, including the petitioner.

Petitioner again misses the mark (Pet. at 25) when it asserts the City had no rights in the private improvements that had been placed on petitioner's property. The City wholeheartedly agrees with this position and recognizes Kaiser-Aetna v. United States, 444 U.S. 164 (1979) stands for this proposition. The reason the above noted case is irrelevant here is the City never asserted such rights. In fact, the City issued a demolition permit which allowed petitioner to raze all improvements on the subject site. Pet. at 7. The City's contention is simple and as stated by the Court of Appeal opinion. "The City could however require that the [petitioner] use [its] property if at all for a recreational purpose." App. 16.[7]

Finally, petitioner's reliance on FCC v. Florida Power Corp., 480 U.S. 245 (1987) is at best confusing. This case permitted the FCC to regulate the rates utilities may charge cable television companies for the use of utility poles. This Court specifically held that such a regulation does not constitute a "per se" taking. In its discussion, this Court again emphasized one of the important rights which

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[7] In citing to Justice Rehnquist's sole dissent in Fresh Pond Shopping Center, Inc. v. Acheson Callahan, 464 U.S. 825 (1983), petitioner goes beyond the bounds of reason. This "case" is a memorandum decision dismissing an appeal of a Massachusetts State Supreme Court decision for want of a substantial federal question.

attach to property ownership. That is, the right to exclude others. Nothing the City did, either in adopting the original recreational land use controls or in assessing the mitigation fee, in any way infringed on petitioner's rights to prevent others from entering its property.

Based upon all the foregoing, neither the City nor the Court of Appeal deviated from the requirements established by this Court in Nollan nor from any other relevant decisions of this Court. The City could have denied the requested land use application for 30 deluxe townhomes, but instead granted petitioner's requested land use approvals. The City mitigated the impacts from such approvals by requiring a condition (the payment of the $280,00 mitigation fee) which would assist in the partial elimination of the lost opportunity to have needed community recreational facilities built on the site. As noted by the Court of Appeal, under either the "rational relation" test or the stricter "substantially advances" test, the City's burden has been met.

B. The Art and Public Places Program

1. The City's Art in Public Places Program Is a Valid Development Condition.

As with the mitigation fee, petitioner asserts[8] the development condition requiring placement of art on a project site violates precedents established by this Court. First, petitioner aileges Nollan is applicable to this condition. Petitioner's assertion is misplaced.

The City's Art in Public Places Program is not an exaction as addressed by Nollan. Instead, as noted by the Court of Appeal and, for that matter the trial court, the art requirement was no different than the City's requirements for setbacks, open space, landscaping and other typical development conditions related to aesthetics. App. 26 and 27.

The art program falls well within the City's police powers as enunciated by Agins v. City of Tiburon, 447 U.S. 255 (1980) and Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). In Agins, this Court determined a City's police power extended to placing conditions which require scenic view restrictions. In Penn Central Transportation Co., the Court concluded a legitimate exercise of the police power was the adoption of regulations which preserved landmark structures.

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[8] It is interesting to note, during oral argument in the Court of Appeal, counsel for petitioner stated petitioner would not have challenged or appealed the art condition, if the mitigation fee had not been levied.

If this Court embraces petitioner's bold assertions that the Art in Public Places Program must and cannot meet the Nollan two-prong test, the City likewise could not require landscaping, architectural amenities or other aesthetic related requirements as conditions of development. Under Nollan, unless the City could deny a requested permit because of its impact on landscaping, architecture or aesthetics in the City, it could not attach landscaping, and other design criteria as conditions of approval for a development. Such an absurd result is obviously not what this Court had in mind when it decided Nollan. In fact, such a conclusion would be contrary to this Court's direction relating to a city's authority regarding aesthetics. This Court has stated time and again community aesthetics are concerns to which a city's police power extends. City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (prohibition against posting signs in the public right of way); Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (prohibition against certain forms of outdoor billboards); Berman v. Parker, 348 U.S. 26 (1954) (requirements to remove blighted housing). It was also noted by the Court of Appeal, the Art in Public Places Program is not dissimilar to parkland dedication requirements, which have been upheld. Associated Home Builders of the Greater East Bay, Inc. v. Walnut Creek, 4 Cal.3d 633 (1971) [cert. denied 404 U.S. 878 (October 19, 1971)]. App. 27. Based upon the foregoing, the City's Art in Public Places Program does not constitute an exaction subject to review under Nollan standards.

2. The Art in Public Places Program Does Not Violate the Equal Protection Clause.

Petitioner states, without support, the Art in Public Places Program violates its equal protection rights. The

only new argument raised is that such a program is not the same as other aesthetic requirements because there is no health and safety issue. As stated earlier, this Court has consistently found cities have authority to legislate in the area of aesthetics. Since the City can require the planting of trees on a development site, it can likewise require the installation of art in an effort to add to the aesthetics of a community.

The use of a City's police power to protect its residents from the ill effects of urbanization has long been recognized as legitimate. Agins v. City of Tiburon, supra, 447 U.S. at 261. This Court has described the scope of the police power.

> An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the Legislature has spoken, the public interest has been declared in terms well-neigh conclusive. In such cases the Legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.

Berman v. Parker, supra, at 32-33 (1954). The City has exercised such power for the well-being and benefit of those working and living within the jurisdictional boundaries of the City through the adoption of its Art in Public Places Program.

The Court of Appeal noted the City's findings contained in the ordinance adopting the art program.

Such findings make it clear the City's interest in the program was to promote the general welfare. App. 24 and 25; Culver City Municipal Code Section 33H-20 (App. 80 and 81).

Programs which promote the public benefit, even when the program shifts the burdens of economic life, do not readily rise to such a level of infringement as to become a "taking". "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, [citation omitted] than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." Penn Central Transportation Co., supra, 438 U.S. at 124.

Even in Nollan, supra, 483 U.S. at 835, Justice Scalia, writing for the majority, reaffirmed there is a wide range of legitimate government interest which can be accomplished through land use regulations. To these interests, the Court of Appeal has correctly added the development of cultural and artistic resources. The Art in Public Places Program is simply a mechanism to provide increased numbers of displayed artworks. Within the scope of the City's constitutionally based police powers, there is sufficient flexibility to design programs to promote the public good, even as the public interest has evolved.

> Until recent years, urban life was comparatively simple; but with a great increase and concentration of population, problems have developed, and constantly are developing which require, and will continue to require, additional restrictions and respect of the use of private lands in urban communities. Regulations, the

> wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, probably would have been rejected as arbitrary and oppressive.

Village of Euclid v. Ambler Realty Company, supra, 272 U.S. at 387.

Based on all the forgoing, there is no difference among requiring a developer to place trees, other landscaping and aesthetic amenities on a site, to adhere to building heights and setback restrictions in designing a structure and to purchase an artwork of the developer's choice for placement on its property. None of these aesthetic requirements violates anyone's equal protection rights.

3. The City's Art in Public Places Program Does Not Violate the Freedom of Speech Rights Established by the First Amendment.

Petitioner argues the City's Art in Public Places Program violates the First Amendment right to free speech because it requires the developer to express a viewpoint or opinion. However, the program is not dissimilar from nor any more burdensome than architectural review which many communities require before building permits are issued. The Art in Public Places Program is nothing more than an attempt to enhance the aesthetics of the community in much the same way architectural review does. If the City is without authority to effectuate the Art in Public Places Program, how could it continue to effectuate architectural review? If such an aesthetic requirement is deemed to be unconstitutional, could not a potential developer argue that First Amendment rights are being violated by a city which requires Romanesque, art

deco or early California mission-style architectural designs?

The Art in Public Places Program does not control content. In the case of a developer who elects to comply with the art program by placing a piece of art on the developer's property, the program does not mandate that the developer install a City chosen piece of artwork or otherwise mandate any particular content for the artwork. The only issues to be determined by the City are the art work's "aesthetic quality and harmony with the proposed project, and the public accessibility to the artwork". Culver City Municipal Code § 33H-27(b); App. 85-86. As stated previously, these concerns are no more burdensome or excessive than architectural review for buildings, prior to the issuance of a building permit.

Petitioner argues the Art in Public Places Program requires petitioner to express other people's ideas. Petitioner asserts it has to commission a third party to produce the artwork. Pet. at 29. Such an assertion is absurd on its face. The art program does not require petitioner to divest itself of its interest in producing artwork of which it approves. As long as such artwork and its proposed location meets the aesthetic quality and harmony of the proposed project, petitioner can commission whatever type of art it desires.

Three cases cited by petitioner in support of its First Amendment claims, deal with governmental actions which, in essence, required individuals to contribute money to organizations which then used the money to express particular ideological points of view. The Art in Public Places Program requires no such contribution.

The art program simply requires a property owner who desires to construct a development on a site within the City, to aesthetically enhance the project and the community by placing a piece of art, of the developer's choice, on the site. Under California law, there is no vested right to obtain a zone change or building permit. The granting of both is a privilege which can be granted subject to reasonable conditions. Avco Community Developments, Inc. v. South Coast Regional Comm'n., 17 Cal.3d 785, 791 (1976) [no vested interest found even though a permit had been issued in conformance with all zoning regulations because the property owner had not performed substantial work and incurred substantial liability in good faith reliance on that permit].

Under the City's art program, a property owner has no obligation to install any art, until development is proposed. If an owner chooses to develop, the City's program requires a work of art to be incorporated into the project as a condition of granting the permission to build.[9] This development condition enhances both the project site and the community.

Petitioner also relies heavily on the Court's decision in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) (mandatory flag salute) to support its contention that the Art in Public Places Program violates its First Amendment rights to free speech. The opinion in West Virginia State Board of Education was a plurality

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[9] The value of the art work must be 1% of the value of the building costs which exceed $500,000 for new development and $250,000 for remodels. Typical landscaping costs for a development account for 10-20% of a total project's cost. App. 30.

decision of three justices. The three concurring justices, one of whom is Justice Murphy (whose opinion is cited by petitioner) focused their decision on the freedom of religion, not the freedom of speech. A few lines after the language quoted by petitioner (Pet. at 29) Justice Murphy states "official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship which, it is well to recall, was achieved in this country only after what Jefferson characterized as the 'severest contest in which I have ever been engaged.' [Footnote omitted.]" West Virginia State Board of Education, supra, at 646. Justices Black and Douglas state in their concurring opinion: "Decision as to the constitutionality of particular laws which strike at the substance of religious tenets and practices must be made by this Court. The duty is a solemn one, and in meeting it we cannot say their failure because of religious scruples, to assume a particular physical position and to repeat the words of a patriotic formula creates a grave danger to the nation. Such a statutory exaction is a form of test oath, and the test oath has always been abhorrent in the United States." West Virginia State Board of Education, supra, at 644.

If the City's Art in Public Places Program required some particular form of religious art (a cross, a six-point star, a star and crescent), then petitioner would be correct in asserting the City had gone beyond the bounds of constitutionally exercising its police power. These are not the facts applicable to this case. All the Art in Public Places Program establishes is a requirement for some aesthetic improvement to be included as part of a development, the nature and content of which can be chosen by the property owner (subject only to City review to ensure the aesthetics of the artwork fits in with the

aesthetics of the architectural design of the development itself).

In any event, petitioner has failed to provide this Court with any clear indication how the Court of Appeal's opinion conflicts with any established decisions of this Court. Therefore, this Court is respectfully requested to deny petitioner's request for review of the Court of Appeal's decision regarding the Art in Public Places Program.

For both the mitigation fee and the Art in Public Places Program, far from demonstrating a conflict between the Court of Appeal opinion and any of this Court's decisions, petitioner instead has revealed a consistent application of Nollan, the Takings Clause, the Equal Protection Clause, and the Free Speech Clause. As to the mitigation fee, the Court of Appeal has established a substantial connection between the fee and petitioner's application for land use changes. The facts of this case, the Court of Appeal decision and California's statutory scheme to implement Nollan illustrate a scrutiny demanded by Nollan and promote clear legislative fact finding. As to the Art in Public Places Program, the Court of Appeal has correctly analogized this development condition to other aesthetics related development conditions.

CONCLUSION
CONCLUSION

For the reasons stated herein, the Court should deny the petitioner's Petition for Writ of Certiorari.

Respectfully submitted,
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